is therefore doing a great public service in granting relief in such cases. It has repeatedly stopped the publishing of advertisements which have falsely described the quality of goods for sale.[50] Business morality has recognized that this is an unfair method of competition. Is the deception of the public and the resulting damage to competitors in the instant case to be less condemned because the misrepresentation is more subtle and ingenious? The merchant has always had the undoubted privilege to "puff" his wares, and it is not the intention of the commission to deprive him of the privilege, but this does not include the misrepresentation of material facts, which has always been regarded as a tort where it has caused injury. Although in the principal case no one had been, perhaps, sufficiently injured by the false representations to recover damages, the methods employed by the petitioner were nevertheless intrinsically unfair, and the commission seems to have been clearly within its powers in suppressing the advertisement.

CONTROL AND THE INDEPENDENT CONTRACTOR.—"The real test to determine whether a person is acting as a servant of another is, to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control."[1] "The test is: Whose work is being done, and who, during the course of that work, has or exercises control over the doing of that work?"[2] Again and again do similar statements appear in texts[3] and reports, and decisions are based upon them. "Because", it is said, "the control[4] is in *M*,[5] *S* is a

[50]See footnote 42, *supra*.

[1]Wood, Master and Servant. § 317, quoted with approval in Indiana Iron Co. *v.* Cray (1897) 19 Ind. App. 565, 578, 48 N. E. 803.

[2]McNamara *v.* Leipzig (1917) 180 App. Div. 515, 520, 167 N. Y. Supp. 981, reversed (1919) 125 N. E. 244.

[3]"The test usually applied is whether the employer retains any control, or right to control, over the means or methods by which the work is to be accomplished. If he does, the employee is a servant; if he does not, the other party . . . is an independent contractor." Huffcut, Agency (2nd ed.) 9. See also Mechem, Agency (2nd ed.) § 40; Tiffany, Principal and Agent, § 3, p. 6; Archer, Agency, § 11.

[4]Every employer has a certain control over work contracted for in that he may supervise the work in order to see that it conforms to the specifications of a contract; that is, he can exercise supervisory control as to the results of the work without becoming liable as master. Stagg *v.* Taylor (1916) 119 Va. 266, 269, 89 S. E. 237. The control referred to here is as to the means and method of performing the work. Lake *v.* Bennett (R. I. 1918) 103 Atl. 145; Flori *v.* Dolph (Mo. 1917) 192 S. W. 949; McGee *v.* Stockton (1916) 62 Ind. App. 555, 113 N. E. 388.

[5]For convenience the parties whose legal relationship is in question will throughout be referred to as *M* and *S* respectively—*M* representing the master or the "inactive" contractor, as the case may be, and *S* the servant of *M*, or the independent contractor or his servant. There are three common types of cases: (a) where *M* is master and *S* is his servant; (b) where *M* is the "inactive" contractor—*i.e.*, the contracting party who wishes something done—and *S* is the independent contractor who undertakes to do it; (c) where *M* is the "inactive" contractor and *S* is the servant of *X*, an independent contractor. For the sake of brevity no distinction between (b) and (c) will be made in the discussion, since in both cases *M*'s liability or non-liability as master for the acts of *S* is determinable by the same considerations as to whether the control, etc., is in *M* or not.

servant";[6] "because the control is in *S*, *S* is an independent contractor".[7] Contrast with the foregoing this quotation from a recent Nebraska decision:[8] "The right to supervise, control and direct the work is one of the tests for determining the nature of the relation which exists, but it is not . . . the sole test." This is obviously vastly different from the former statements, and although the former are by far the more frequent, an attempt will be made to show that the latter is more accurate.

Who is to have control of the work, who is to furnish the tools, materials and labor, who is to gain the profit, and who to risk the loss incident to an undertaking, in other words who is the entrepreneur, is determined by the agreement between the parties. It is a striking fact that in those cases decided ostensibly upon the "control" doctrine, the party to whom the agreement awards the control has also other of the attributes of the entrepreneur. It is an unusual case indeed in which either *M* or *S* has the control and nothing else.[9] Therefore, it is questionable in every case whether the court is relying on the element of control, having knowledge of the other facts and intentionally disregarding them as unimportant, or whether, although the court rests its decision ostensibly upon control alone, it is not, perhaps, influenced by the fact that he who has control also exhibits under the terms of the contract other attributes of the entrepreneur.

Whether the correct interpretation of the courts' decisions is that last suggested or not, it is proposed that other clauses of the contract besides that awarding control should be considered in determining the responsibility of *M* for the torts of *S*. The responsibility of a master for the unauthorized torts of his servant committed while doing the master's work, while often assailed, has nevertheless persisted for more than a century, which leads one to believe that there must be some sound policy behind the rule. The desirability of making injuries to persons or property incident to carrying on an enterprise a part of the cost of operation—as in Workmen's Compensation—suggests itself. This throws light upon the often recurring statement in the cases that the test of whether *S* is a servant or an independent contractor is: Whose work is being done; if it is *M's*, *S* is a servant; if it is his own, *S* is an independent contractor. This test is generally recognized, but it is just as generally added that the determination of whose business *S*

---

[6]Simmons *v.* Lumber Co. (1917) 174 N. C. 220, 227, 93 S. E. 736; Coles *v.* Boston & Me. R. R. (1916) 223 Mass. 408, 414, 111 N. E. 893; Gordon *v.* Roberts (1916) 30 Cal. App. 76, 78, 157 Pac. 15.

[7]The Satilla (C. C. A. 1916) 235 Fed. 58; Gall *v.* Detroit Journal Co. (1916) 191 Mich. 405, 409, 158 N. W. 36; McGee *v.* Stockton, *supra*, footnote 4; Flori *v.* Dolph, *supra*, footnote 4.

[8]Barrett *v.* Selden-Breck Const. Co. (Neb. 1919) 174 N. W. 866, 868.

[9]The case is unusual because it is very unlikely that *M* will give the entire control to someone else if he is risking the loss and has all the other interests. He would at least wish to retain the right to control. The converse is also unlikely. If *M* has given out the work to *S* and the latter is to furnish the materials, risk the loss, etc., the only interest *M* now has in the control of the work is as to its result and that is not ordinarily considered as "control". See footnote 4, *supra*.

is carrying on depends upon who has control of the work.[10] That this is unsound appears when a case in which control is segregated in one party is examined. Suppose *M*, desiring a house to be built, furnishes the material, hires and pays the workmen, bears the risk of profit and loss, but since he knows nothing about building, employs *S* under a contract giving him complete control of construction. Would a court in such a case hold that *S* is employed in his own business? Similarly, if *M* wishes to retain the right of full control over the construction, with all the other elements previously mentioned apportioned to *S*, it would seem equally dubious to say that *S* is doing *M's* business. To determine whose business is being done is to determine who is the entrepreneur. The attributes which distinguish the entrepreneur from the capitalist and the wage earner are (1) control, (2) supplying the tools, material and labor, (3) the right to profits, and (4) the risk of loss. The party to the contract who under its terms shows the majority of these attributes, is the entrepreneur, *i. e.*, the business is his.[11]

But, one might argue, since in most cases the control rests with him whose business is being done, it is simpler to disregard everything except control and have a simple rule which in the majority of cases reaches the same result as if all the elements had been considered. A sufficient objection to this test is that it is sometimes necessary, in applying it, arbitrarily to assume a fact which does not appear from the evidence. A recent New York case, *McNamara* v. *Leipzig* (1919) 125 N. E. 244,[12] shows the result of attempting to apply the control test at any cost. In that case, the defendant made a written contract with a garage company under which the latter for a fixed sum agreed to supply a car and chauffeur, pay all operating expenses and put it at the defendant's disposal for three months. The defendant could call for the car and chauffeur at any time, day or night, and direct when and where he should be driven. Who had the right under the contract to control the operation is not clear. While the chauffeur was driving through a street specifically designated by the defendant, he hit and killed the plaintiff's intestate. The lower court, after finding that under the written contract the control was in the defendant, felt bound to hold the defendant liable. The Court of Appeals reversed the judgment since it seemed to that court that the chauffeur was employed in the garage company's business in driving the defendant and, therefore, the defendant should not be responsible. However, apparently feeling bound by the "control" doctrine, the court declared that the garage company exercised control. It would seem that in this case the question whether the defendant or the garage company

[10]Hartell *v.* Simonson & Son Co. (1916) 218 N. Y. 345, 113 N. E. 255; Standard Oil Co. *v.* Anderson (1909) 212 U. S. 215, 29 Sup. Ct. 252. See dissenting opinion of Miller, *J.*, in Schmedes *v.* Deffaa (1912) 153 App. Div. 819, 822, *et seq.*, 138 N. Y. Supp. 931, adopted by the Court of Appeals in (1915) 214 N. Y. 675, 108 N. E. 1107; McNamara *v.* Leipzig, *supra,* footnote 2.

[11]Attention should be called to the fact that, according to some decisions, the test in determining who is an employer within the meaning of a Workmen's Compensation Act is not whether the common law relation of master and servant exists. *In re* Rheinwald (1915), 168 App. Div. 425, 153 N. Y. Supp. 598; Matter of Dale *v.* Saunders Bros. (1916), 218 N. Y. 59; 112 N. E. 571; see 16 Columbia Law Rev. 610.

[12]Reversing McNamara *v.* Leipzig, *supra,* footnote 2.

had control was immaterial since the other three attributes of the entrepreneur (ownership of the tools, right to profit, and risk of loss) were exhibited by the garage company, and the court might properly have decided that the chauffeur was engaged in the garage company's business without asserting that the company had control when, in view of the terms of the written contract, this finding was exceedingly doubtful.

THE MEASURE OF LIABILITY OF A MUNICIPAL CORPORATION TO THE ORIGINAL HOLDER OF INVALID BONDS.—The question as to the right of a person to recover from a municipal corporation, when he has parted with value to it in return for its void promise, is one on which there is much conflict of authority.[1] An interesting phase of the problem is presented by the case of *City of Henderson* v. *Winstead* (Ky. 1919) 215 S. W. 527. Pursuant to a state statute,[2] which was later held to be unconstitutional,[3] and to an ordinance passed thereunder, the city had issued certain street improvement bonds, which the plaintiff Winstead purchased from the city, giving his check in payment therefor. In an action of assumpsit for money had and received, the court permitted him to recover from the city the money paid for the invalid bonds, saying that it was merely compelling the city to refund to the plaintiff the money obtained from him without consideration.[4]

In two cases where recovery was denied under similar circumstances, in New Jersey[5] and New York[6] respectively, the court argued, broadly, that where the city had no power to contract, either granted by statute or implied by the law, no liability to pay should be imposed by the court upon the city, since to do so would be to accomplish indirectly exactly what the limitations dictated by statute and by public policy were designed to prevent—namely, the payment of the amount unlawfully contracted for. The New Jersey court, which refused to allow a recovery in assumpsit for money had and received, hinted that the lender might perhaps have recovered in equity on the theory that he was subrogated to the rights of those creditors of the city who had been paid with his money, and seems to have held merely that no action at law would lie.[7] The New York court seems to have held that the plaintiff could not recover in his own right at law or in equity,

---

[1]4 Columbia Law Rev. 67; Woodward, Quasi-Contracts, § 161.

[2]Ky. Stat. (1915) § 3459a.

[3]Hickman, Mayor *v.* Kimbley (1914) 161 Ky. 652, 171 S. W. 176.

[4]The grounds of the decision are set forth at length in City of Henderson *v.* Redman (Ky. 1919) 214 S. W. 809, relied on in the instant case.

[5]Town of Hackettstown *ads.* Swackhamer (1874) 37 N. J. L. 191.

[6]Wells *v.* Town of Salina (1890) 119 N. Y. 280, 23 N. E. 870.

[7]"The lender of such money may, perhaps, have his redress . . . by a recourse to equity, asking to be subrogated to the rights of those creditors who have received his money, instead of having their debts paid by the corporation . . . But whether the owner of this paper be remediless or not, it is enough for the present purpose to say that there is no apparent ground on which this money, thus illegally loaned, can be recovered in an action at law." Town of Hackettstown *ads.* Swackhamer, *supra*, footnote 5, at p. 197. *Cf.* North Bergen *v.* Eager (1879) 41 N. J. L. 184.